(1)

90-1185

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT,

Petitioner,

v.

SUSAN NELSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

When a defendant has been convicted of assault on a plea of guilty and the victim subsequently dies, does the due process clause bar prosecution of the defendant for manslaughter because of an "implied promise," refuted by the record of the initial guilty plea, that no further prosecution for the incident would occur?

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In The

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STATE OF CONNECTICUT,

Petitioner,

v.

SUSAN NELSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Appellate Court, entered in this proceeding on September 11, 1990.

OPINION BELOW

The opinion of the Connecticut Appellate Court is reported at 23 Conn. App. 215, ____ A.2d ____ (1990) and is reprinted in the appendix, p. A1, *infra.* The Connecticut Supreme Court's denial of the state's petition for

tification is reported at 216 Conn. 826, ____ A.2d ____ (1990) and is reprinted in the appendix, p. A9, *infra*.

JURISDICTION

The decision of the Connecticut Appellate Court was entered on September 11, 1990. The Connecticut Supreme Court's denial of the state's petition for certification was entered on October 23, 1990. The jurisdiction of this Court to review the judgment of the Connecticut Appellate Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes § 53a-60d (Rev. to 1985):

> **Assault in the second degree with a motor vehicle: Class D felony.** (a) A person is guilty of assault in the second degree with a motor vehicle

when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes serious physical injury to another person as a consequence of the effect of such liquor or drug.

(b) Assault in the second degree with a motor vehicle is a class D felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year.

Connecticut General Statutes § 53a-56b (Rev. to 1985):

Manslaughter in the second degree with a motor vehicle: Class C felony. (a) A person is guilty of manslaughter in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as a consequence of the effect of such liquor or drug.

(b) Manslaughter in the second degree with a motor vehicle is a class C felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year.

Connecticut Practice Book § 694:

Procedure for Plea Discussions – Notice of Plea Agreement: If a plea agreement has been reached by the parties, which contemplates the entry of a plea of guilty or nolo contendere, the judicial authority shall require the disclosure of the agreement in open court or, on a showing of good cause, in camera at the time the plea is offered. Thereupon the judicial authority may accept or

reject the agreement, or he may defer his decision on acceptance or rejection until there has been an opportunity to consider the presentence report, or he may defer it for other reasons.

STATEMENT OF THE CASE

On February 20, 1988, the respondent's vehicle struck and seriously injured a 13-year-old boy in Milford, Connecticut. On April 26, 1988, the respondent entered a plea of guilty to a charge of second-degree assault with a motor vehicle while intoxicated. At the time of respondent's plea, the victim remained in the hospital with severe head and internal injuries.

Prior to her acceptance of her plea to assault, the respondent was canvassed by the trial court in accordance with Connecticut procedure. During this canvass, the following colloquy occurred:

> *The Court:* It's been indicated to the Court that there is an agreed recom[m]endation in the sentence of 5 years to the custody of the commissioner of corrections, that's 5 years in prison, suspended after 3 years with a probationary period and conditions to follow. That's what's been told to the Court. Do you understand that the Court is not bound to accept that recom[m]endation. If I feel it's not a fair sentence, I won't impose that sentence and if I do that, however, you'll be able to withdraw your guilty plea. Do you understand that?
>
> *Miss Nelson:* Yes, sir.

The Court: Other th[a]n that, once I accept your guilty plea you can't withdraw the guilty plea unless you can show some good cause to do so. Do you understand that?

Miss Nelson: Yes.

The Court: Have any other promises been made to you by anybody to cause you to plead guilty?

Miss Nelson: No, sir.

The guilty plea was accepted by the court and the respondent was sentenced in accordance with the agreement.

On October 26, 1988, the victim died as a result of the injuries he received from being struck by the respondent's vehicle. A warrant was subsequently issued for the respondent's arrest on the charge of second-degree manslaughter with a motor vehicle. The respondent moved to dismiss the manslaughter charge, arguing that (1) it was barred by principles of double jeopardy and (2) under principles of due process, the state "effectively waived its rights to prosecute" the respondent by failing to reserve them in the event that the victim died. The trial court denied the motion to dismiss, concluding that there was no double jeopardy bar and finding that the prosecutor believed at the time of the first plea that the victim "was going to make it." After withdrawing her plea to assault, the respondent entered a plea of nolo contendere to manslaughter, conditioned on her right to appeal the denial of her motion to dismiss. The respondent was then sentenced to a term of ten years imprisonment, suspended after four years, and five years probation, with credit for the time served on the earlier conviction.

On August 1, 1989, the respondent appealed to the Connecticut Appellate Court, reasserting her claim of double jeopardy and also claiming that the manslaughter prosecution violated due process because the state "induced in the [respondent] a reasonable belief that she would face no further criminal liability." On September 11, 1990, the Appellate Court reversed the manslaughter conviction and ordered the assault conviction reinstated. *State v. Nelson,* 23 Conn. App. 215, ____ A.2d ____ (1990) (appendix at A1). The Court did not address the double jeopardy issue, but found merit to the defendant's due process claim.

On October 23, 1990, the Connecticut Supreme Court denied the State of Connecticut's petition for certification to appeal the Appellate Court judgment. *State v. Nelson,* 216 Conn. 826, ____ A.2d ____ (1990) (appendix at A9).

REASONS FOR GRANTING THE PETITION

The Connecticut Appellate Court has held that the Due Process Clause recognizes and enforces an implicit promise not to further prosecute if the state fails to warn a defendant, prior to her guilty plea for assault, that she may face additional prosecution if the victim dies. The court held that the principles of fairness inherent in the Due Process Clause require this result even though the defendant misrepresented on the record at the time of her plea that no further, unrecorded promises had induced her plea. The state court's holding directly conflicts with the decisions of this Court and the federal courts of appeal reaffirming the solemnity of a guilty plea and imposes upon judges and prosecutors additional obligations which undermine the "presuppos[ition of] fairness in securing agreement between an accused and a prosecutor." *Santobello v. New York*, 404 U.S. 257, 261 (1971).

If the analysis of the court below is accepted by courts generally, there will be an inescapable diminution in the solemnity of guilty pleas in American courts. Indeed, defendants will need only to contest their guilty pleas, with the benefit of hindsight, upon ephemeral notions of what was "implied" in their plea agreement. Prosecutors, and judges too, will be less likely to engage in plea bargaining for fear that they must account for every conceivable implied consequence of the agreement, regardless of how specific and thorough the plea canvass might be.

A. The Decision Below Conflicts With The Decisions Of This Court And Federal Courts Acknowledging The Indispensability Of Plea Bargaining And Enforcing The Specified Terms Of A Guilty Plea.

1. The decision below conflicts with the decisions of this Court in *United States v. Benchimol* and *Blackledge v. Allison.*

This case reaches far beyond the vagaries of Connecticut procedure or, for that matter, the specific facts of this case. Even assuming that the factual findings of the Connecticut Appellate Court are correct,[1] the fact remains that the state appellate court has, under a conveniently broad expansion of due process protections, imported an "implied promise" component to plea agreements in Connecticut. If this approach were to proliferate, the facts of this or any case would have little bearing on the important question of law and policy posed: Does the Due Process Clause require subsequent enforcement of additional, unrecorded terms to a plea agreement when a defendant had represented at the time of the plea that no additional, unrecorded promises were made to induce the plea? The cases of this and other courts refute the notion that it does.

Relying upon this Court's decision in *Santobello,* 404 U.S. at 260-61, the Connecticut Appellate Court concluded that the right of due process provided by the federal constitution required dismissal of the manslaughter charges because the prosecution failed to warn the

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[1] *See* footnote 2, *infra.*

respondent at the time of her plea to assault that she could face a manslaughter prosecution if the victim subsequently died. *State v. Nelson,* 23 Conn. App. at 218–219 (appendix at A4–A6). The court gave no weight to the undisputed fact that, at the time of her plea to assault, the respondent represented to the court that no promises were made to induce her plea other than the promise of a three-year sentence for that charge. The court concluded that, notwithstanding this solemn representation by the respondent, due process imposed upon the prosecution the obligation to enunciate what "was not covered by the agreement" and to "reserv[e] a right to prosecute in the event of the victim's death" or else forego such a right. *State v. Nelson,* 23 Conn. App. at 219 (appendix at A6). Because the prosecution failed to make such a reservation in this case, the court concluded that implicit in the agreement was a promise by the state barring any further prosecution in the event of the victim's death and that the Due Process Clause requires enforcement of that implicit agreement.[2]

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[2] To support its conclusion that a promise barring further prosecution in the event of the victim's death was implicit in this case, the court reasoned that it would have been illogical for the respondent to have agreed to a three-year term of imprisonment in the absence of such a promise. It also noted that the state's destruction of "certain evidence" after the respondent was sentenced for assault supported a reasonable belief that there would be no further criminal liability.

Connecticut consistently has contended that the Connecticut Appellate Court, contrary to state procedure, improperly engaged in factfinding to contradict and supplement the facts found by the trial court regarding what the parties actually

(Continued on following page)

By interpreting the Due Process Clause to require enforcement of implicit, unrecorded terms to a plea agreement, the state court's holding conflicts with this Court's decisions in *United States v. Benchimol,* 471 U.S. 453, 456 (1985) and *Blackledge v. Allison,* 431 U.S. 63 (1977).

In *Benchimol,* the Ninth Circuit Court of Appeals had concluded that the government failed to comply with its part of the plea bargain because, although it recommended a lenient sentence in accordance with the explicit provisions of the agreement, the government made the recommendation with "less-than-enthusiastic support." *Benchimol,* 471 U.S. at 455, citing 738 F.2d 1001, 1002 (CA9 1984). The Ninth Circuit held that "when the government undertakes to recommend a sentence pursuant to a plea bargain, it has the duty to state its recommendation clearly to the sentencing judge and to express the justification for it." 738 F.2d at 1002. This Court subsequently reversed the Ninth Circuit, holding that "it was error for the Court of Appeals to imply as a matter of law a term which the parties themselves did not agree upon." *Benchimol,* 471 U.S. at 456.[3] Here, the Connecticut Appellate

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(Continued from previous page)

believed. *See State v. Gilnite,* 202 Conn. 369, 379, 521 A.2d 547 (1987) (not for an appellate court to speculate whether a plea was conditioned upon terms not appearing in record). For purposes of this petition, however, the state assumes that the facts cited by the Connecticut Appellate Court are controlling.

[3] Although *Benchimol* involved consideration of Federal Rule 11(e), which controls federal plea bargains generally, it is axiomatic that the Court's interpretation of that Rule must comport

(Continued on following page)

Court did exactly what the Ninth Circuit did in *Benchimol* – it placed upon the government the "duty" to reserve any rights not expressly stated in the agreement and "impl[ied] as a matter of law" a forfeiture of all prosecutorial rights not expressly reserved by the government.

In *Blackledge,* this Court affirmed a Court of Appeal's ruling that a habeas corpus petition which alleged that a guilty plea was induced by an unkept promise should not have been summarily dismissed without an evidentiary hearing. *Blackledge,* 431 U.S. at 75–76. The Court noted that, at the time of the taking of the plea, the North Carolina guilty plea procedure had not been modified in light of *Santobello;* that no transcript of the proceeding had been made; that the record was "silent as to what statements [the defendant], his lawyer, or the prosecutor might have made regarding promised sentencing concessions;" and that the pre-*Santobello* "atmosphere of secrecy which then characterized plea bargaining generally" excused the defendant's failure to state the terms of the alleged plea bargain earlier. *Blackledge,* 431 U.S. at 76–77. The Court stressed, however, that had formal procedures regarding acceptance of guilty pleas been adopted and followed, the

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with due process strictures. The Court could not have concluded that Rule 11(e) imposes no additional, "implied-in-law" terms to a plea agreement if such a conclusion would have conflicted with due process protections.

> petition would have been cast in a very different light. The careful explication of the legitimacy of plea bargaining, the questioning of both lawyers, and the verbatim record of their answers at the guilty-plea proceedings would almost surely have shown whether any bargain did exist and, if so, insured that it was not ignored.

Blackledge, 431 U.S. at 79–80. *See also, id.,* 431 U.S. at 84 (Powell, J., concurring).

This case presents the precise scenario envisioned by *Blackledge.* Through its rules of court, Connecticut courts have mandated that plea agreements be disclosed in open court. *See* Connecticut Practice Book § 694. Yet, despite the state's strict adherence to that mandate, the court below has seen fit to honor only in the breach this Court's admonition in *Blackledge.*

2. The decision below conflicts with the decisions of numerous federal courts of appeal.

The Connecticut Appellate Court's "implied promise" theory of plea bargaining also is contrary to the view of every federal circuit which has addressed such claims. Indeed, each of these courts has emphasized the importance of the literal, on-the-record terms of plea agreements, thus rejecting the view that "implied promises" may be used to impeach such agreements. *See United States v. Doherty,* 867 F.2d 47, 72 (1st Cir. 1989); *United States v. U.S. Currency, The Amount of $228,536.00,* 895 F.2d 908, 914 (2d Cir. 1990); *United States v. Annabi,* 771 F.2d 670, 672 (2d Cir. 1988); *United States v. Fentress,* 792 F.2d 461, 464 (4th Cir. 1986); *Harmason v. Smith,* 888 F.2d 1527 (5th Cir. 1989); *United States v. Ykema,* 887 F.2d 697 (6th Cir.

1989), *cert. denied,* in 110 S.Ct. 2565; *Baker v. United States,* 781 F.2d 85, 90 (6th Cir. 1986); *United States v. Jordan,* 870 F.2d 1310, 1316 (7th Cir. 1989); *United States v. Coleman,* 895 F.2d 501, 506 (8th Cir. 1990); *United States v. Schmitz,* 887 F.2d 843 (8th Cir. 1989); *United States v. Quan,* 789 F.2d 711, 714 (9th Cir. 1986); *United States v. Pogue,* 865 F.2d 226 (10th Cir. 1989); *In re Grand Jury Proceedings,* 819 F.2d 984, 986-87 (11th Cir. 1987).[4]

In fact, the court below arguably has brought itself into conflict, as a matter of federal law, with the Second Circuit, which has held that due process is not violated by a New York state policy which bars enforcement of any promises not contained in the record of the plea proceeding. *Siegel v. State of New York,* 691 F.2d 620 (2d Cir. 1982), *cert. denied,* in 459 U.S. 1209, *reh. denied,* in 460 U.S. 1104. If due process does not demand enforcement of off-the-record plea agreements, no matter how explicit,

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[4] There appears to be a split of authority among state courts regarding enforcement of unrecorded terms to plea agreements. *See People v. Hood,* 62 N.Y.2d 863, 477 N.Y.S.2d 621, 622, 466 N.E.2d 161 (Ct.App. 1984) and *People v. Selikoff,* 35 N.Y.2d 227, 244, 360 N.Y.S.2d 623, 318 N.E.2d 784, *cert. den.* 419 U.S. 1122 (absolute bar on enforcement of unrecorded terms); *State v. Lucero,* 639 P.2d 1200, 1204 (N.M. 1981) *(id.); York v. State,* 619 P.2d 391, 394 (Wyo. 1980) (emphasizing absence of alleged additional terms in recorded plea agreement); *Commonwealth v. Lesko,* 501 A.2d 200, 209-10 (Pa. 1985), *cert. denied,* in 479 U.S. 1101 *(id.); Parker v. Indiana,* 542 N.E.2d 1026, 1029 (Ind. 1989) *(id.); State v. Frisard,* 566 So.2d 169 (La.App.5 Cir. 1990) (enforcing implied promise by state not to file multiple bill notwithstanding absence of such promise from recorded agreement); *State v. Dinndorf,* 658 P.2d 372 (Mont. 1983) (noting disagreement with New York state policy of refusal to enforce unrecorded agreements).

then it clearly does not require enforcement of off-the-record, implicit ones.[5]

B. The Decision Below Disrupts, As A Matter Of Policy, The Delicate Balance Between A Defendant's Rights And A State's Interests In Plea Bargaining, And Therefore Presents A Question Of National Significance.

Guilty pleas account for at least 90% of all criminal convictions in the United States. ABA Standards for Criminal Justice, Pleas of Guilty, 14.4, 2d Ed. (1986). As the state court recognized, at least nominally, "without this vital process, the overburdened wheels of justice would nearly grind to a stop." 22 Conn. App. at 218 (appendix at A4). As this Court stated in *Santobello,* 404 U.S. at 261, considerations which make plea bargaining an "essential" and "highly desirable" part of the criminal process "presuppose fairness in securing agreement between an accused and a prosecutor." Yet, the Connecticut Appellate Court concluded here that fairness also imposes the burden on the prosecution to specify what is *not* covered by an agreement, notwithstanding respondent's explicit concession, on the record, that the agreement included no terms other than the sentencing recommendation. "Solemn declarations in open court

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[5] The Connecticut Appellate Court's reliance on the Second Circuit decision in *Paradiso v. United States,* 689 F.2d 28 (2d Cir. 1982) is misplaced. *Paradiso* involved the question of whether a defendant reasonably interpreted an express, but ambiguous, provision of a plea agreement. *Paradiso* does not stand for the proposition that, where there is *no* provision for a future contingency, a defendant's "reasonable belief" may create one.

carry a strong presumption of verity." *Blackledge v. Allison,* 431 U.S. 63 (1977). The integrity of guilty plea proceedings will be severely undermined if defendants are entitled to impeach so cavalierly their "solemn" representations in order to obtain the windfall of further, implicit promises not expressly disavowed by the prosecution.

Moreover, prosecutors and judges alike, constrained to operate under this definition of "fairness," will be forced to conceive of every potential implication of a plea agreement, lest they run the risk of the result evident here. One wonders whether, under such risks, plea agreements would remain a valid alternative in the criminal justice system.

Finally, the decision below is significant for what it does not say. *Santobello* reaffirmed the right of the accused to be counseled prior to entering a guilty plea, a right fully afforded the respondent here. *Santobello,* 404 U.S. at 261. Inexplicably, the court below attached no significance to the presence of defense counsel and placed absolutely no obligation on counsel to correct his client's misrepresentation to the trial court as to the existence of further promises. Surely the presence of counsel had greater significance. *See Henderson v. Morgan,* 426 U.S. 637, 647 (1976).

CONCLUSION

The Connecticut Appellate Court has held that, absent enforcement of an additional, unrecorded "implied promise" underlying the respondent's guilty plea, the respondent's due process rights would have been violated in this case. By creating and enforcing an "implied promise" by the state not to further prosecute the respondent in the event of the victim's death, the court below has achieved an unprecedented expansion of due process protections and has brought itself into conflict with the decisions of this Court, the federal courts of appeal and numerous state courts of last resort. If allowed to proliferate, the reasoning of the state court threatens the solemnity and finality of guilty pleas, which have become an essential component of our criminal justice system.

Respectfully submitted,

THE STATE OF CONNECTICUT

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January, 1991

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APPENDIX

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OPINION OF CONNECTICUT APPELLATE COURT A1

DENIAL OF CERTIFICATION TO CONNECTICUT SUPREME COURT A9

STATE OF CONNECTICUT *v.* SUSAN NELSON
(8297)

O'CONNELL, LAVERY and CRETELLA, Js.

Convicted, on a conditional plea of nolo contendere, of the crime of manslaughter in the second degree with a motor vehicle, the defendant appealed to this court. She claimed, inter alia, that the manslaughter prosecution violated an earlier plea agreement involving the charge of assault in the second degree with a motor vehicle arising out of the same incident. *Held* that the trial court should have granted the defendant's motion to dismiss the manslaughter charge; the agreement under which the defendant pleaded guilty to assault barred her reprosecution on manslaughter charges because, in bargaining for the plea, the state induced in her a reasonable belief that no further charges would be brought if the victim died.

Argued June 18 – decision released September 11, 1990

Information charging the defendant with the crime of manslaughter in the second degree with a motor vehicle, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number five, and presented to the court, *Reilly, J.*, on a plea of nolo contendere; judgment of guilty, from which the defendant appealed to this court. *Reversed; judgment directed.*

Gary Case, certified legal intern, with whom were *Timothy H. Everett* and *Pamela A. Mitchell,* certified legal intern, and, on the brief, *Michael R. Sheldon,* for the appellant (defendant).

James A. Killen, assistant state's attorney, with whom, on the brief, were *Mary Galvin,* state's attorney, and *Paul Gaetano,* deputy assistant state's attorney, for the appellee (state).

O'CONNELL, J. This appeal arises after the defendant's conditional plea of nolo contendere to a charge of manslaughter in the second degree with a motor vehicle in violation of General Statutes § 53a-56b. She argues that this manslaughter prosecution (1) violated an earlier plea agreement involving a lesser charge arising out the same incident, and (2) violated the constitutional prohibition against double jeopardy. We reverse.

The following facts are relevant to this appeal. On February 20, 1988, the defendant was driving southbound on Surf Avenue in Milford when she lost control of her vehicle. Her car crossed the northbound lane, mounted the curb and struck a thirteen year old victim, who had been unable to escape the path of the oncoming car. The victim suffered severe head and internal injuries. The defendant failed a field sobriety test and two subsequent breath tests, which showed a blood alcohol level of .163 and .141. She was subsequently charged, inter alia, with assault in the second degree with a motor vehicle in violation of General Statutes § 53a-60d.

On April 26, 1988, defense counsel, the state's attorney and Bernard F. Joy, the attorney who represented the victim and his family, met in a pretrial conference with the trial judge in his chambers to discuss a plea agreement. At that conference, Joy informed all present that the victim was still hospitalized in grave condition and that he might not live. At the conclusion of the conference, the trial judge indicated that he would accept the plea. The defendant then pleaded guilty to the assault charge pursuant to the agreement.

The defendant's sentencing took place on June 10, 1988. At the hearing, the victim's mother described the condition of her hospitalized son. She informed the court, *Gill, J.*, that the victim's condition was still extremely serious and that he faced a long and difficult recovery period. The court then sentenced the defendant to the agreed upon term of five years in the custody of the commissioner of correction, suspended after three years, and five years probation. At the conclusion of its sentencing remarks, the court granted the state's request that property seized from the defendant be destroyed. General Statutes § 54-36a.

The victim died from his injuries on October 26, 1988, never having left the hospital. On February 21, 1989, a warrant was issued for the defendant's arrest on the charge of manslaughter in the second degree with a motor vehicle. The defendant moved to dismiss the information on the grounds that the new prosecution was barred by principles of double jeopardy and that the state had waived any rights to bring additional charges when it agreed to the April, 1988 plea bargain.

At the hearing on the defendant's motion, the court, *Reilly, J.*, found that, prior to the defendant's guilty plea, Joy had informed all concerned of the victim's precarious condition. The court also found, however, that other information, including hospital records, indicated that the victim had been recovering. The court concluded that it would not hold the state to predicting the victim's death, and it denied the motion to dismiss.

The court then indicated that it would allow the defendant to withdraw her earlier guilty plea, and the defen-

dant did so on June 22, 1989. This was followed by the defendant's plea of nolo contendere to the manslaughter charge, conditioned on her right to appeal the denial of her motion to dismiss. General Statutes § 54-94a; Practice Book § 4003. She was sentenced to a term of ten years imprisonment, suspended after four years, and five years probation, with credit for time served on the earlier conviction. This appeal followed.

In her first claim, the defendant argues that the agreement under which she pleaded guilty to assault barred her reprosecution on a manslaughter charge because, in bargaining for the plea, the state induced in her a reasonable belief that no further charges would be brought if the victim were to die. She argues that the second prosecution thus violated her due process guarantees. The state counters that it abided by the terms of the agreement and that no mention was made of the chance of further prosecution. Any misunderstanding by the defendant, the state asserts, cannot be attributed to anything the state did or did not say or do.

Plea agreements are an essential and necessary part of the administration of justice; *Santobello v. New York*, 404 U.S. 257, 260-61, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); and, without this vital process, the overburdened wheels of justice would nearly grind to a stop. "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects

the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." Id., 261. This essential tool of the criminal justice system will lose its efficacy if the state's performance of the agreement is contrary to the reasonable expectations of the defendant. *State v. Lopez,* 197 Conn. 337, 341, 497 A.2d 390 (1985); *State v. Thomas,* 61 N.J. 314, 321, 294 A.2d 57 (1972). "Because a defendant waives several constitutional rights when [she] elects to plead guilty to a criminal offense, the choice of a guilty plea is of profound significance." *State v. Lopez,* supra.

If the state makes promises to the defendant in order to induce a guilty plea, those promises must be fulfilled; *Santobello v. New York,* supra, 262; and " '[t]he breaking of a promise made by the prosecutor as a result of plea negotiations is sufficient to invalidate a conviction.' " *Szarwak v. Warden,* 167 Conn. 10, 19, 355 A.2d 49 (1974); see also *Paradiso v. United States,* 689 F.2d 28, 30 (2d Cir. 1982), cert. denied, 459 U.S. 1116, 103 S. Ct. 752, 74 L. Ed. 2d 970 (1983).

Where, as here, there is a dispute as to the terms of a plea agreement, our analysis turns on "the real intent of the parties, and most significantly, of [the defendant]. . . ." *Paradiso v. United States,* supra, 31. The defendant argues that she reasonably believed that the plea agreement terminated all her criminal liability flowing from the accident. Despite the state's silence as to what would happen if the victim died, its conduct strongly

implied that it shared the defendant's interpretation of the plea agreement.

The trial court found that the parties were aware of the victim's precarious condition. While it is true that at the sentencing hearing the victim's mother spoke of his eventual recovery, the state and the defendant had to be aware that this was by no means a certainty. Under the circumstances, it was incumbent upon the state to ennunciate what was and was not covered by the agreement lest the defendant be allowed to go to plea under the impression that the criminal portion of this tragic episode was closed. If the state was reserving a right to reprosecute in the event of the victim's death, it could have, and should have, said so. It did not even remotely imply that this was its intent.

We take particular note of the fact that, at the conclusion of the June, 1988 sentencing, the state moved to have certain evidence in the case destroyed. At oral argument, the state suggested that this evidence related to two additional criminal charges that were nolled as part of the plea agreement. We need not accept the state's invitation to go outside the record and confirm this fact. The destruction of any evidence seized at a crime scene is consistent with a belief that no further charges will be brought and lends credence to the defendant's claim that she reasonably believed her plea ended her criminal liability.

Furthermore, we think it significant that the parties agreed to a specific term of imprisonment. We question whether the defendant would have given her assent to a prison term if she thought that additional, more serious charges could be brought later. See *State v. Schaeffer*, 5

Conn. App. 378, 390, 498 A.2d 134 (1985) (term of imprisonment is the defendant's "bottom line"). It is a basic principle of law that common sense is not left at the courtroom door. See *State v. Zayas,* 195 Conn. 611, 620, 490 A.2d 68 (1985). It would be illogical to conclude that the defendant would have agreed to a three year term of imprisonment if she believed that it was perhaps only the first installment on a lengthier term to be imposed if Eric died.

The state also contends that even if we find that the plea agreement was breached, the breach was harmless because the defendant was allowed to withdraw her plea on the assault charge. We disagree. It is true that "fairness ordinarily impels the court, in its discretion, either to accord specific performance of the agreement or to permit the opportunity to withdraw the guilty plea." *State v. Littlejohn,* 199 Conn. 631, 644, 508 A.2d 1376 (1986). If the plea is withdrawn, however, that means that the defendant will plead anew to the original charges. *Santobello v. New York,* supra, 263 n.2. Under the facts of this case, we conclude that it would be unjust to the defendant for us to vacate her plea when she "has already been punished for the crime to which [she] confessed." *State v. Thomas,* supra, 324. Accordingly, we hold that specific performance of the agreement is the only appropriate remedy because it is the only way that the status quo can be restored. Id.

In view of our disposition of the first claim, we do not reach the double jeopardy issue.

The judgment of conviction of manslaughter in the second degree with a motor vehicle is reversed and the

case is remanded with direction to reinstate the defendant's conviction of assault in the second degree with a motor vehicle.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SUSAN NELSON

The state of Connecticut's petition for certification for appeal from the Appellate Court, 23 Conn. App. 215, is denied.

James A. Killen, assistant state's attorney, in support of the petition.

Timothy H. Everett and *Gary M. Case,* certified legal intern, in opposition.

Decided October 23, 1990

Supreme Court, U.S.
FILED
FEB 22 1991
OFFICE OF THE CLERK

(2)

No. 90-1185

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
Petitioner

v.

SUSAN NELSON,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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Question Presented

Whether the Connecticut Appellate Court erred in holding that due process of law was violated when the State of Connecticut prosecuted the respondent for manslaughter, after the State, in bargaining for the respondent's guilty plea to assault based on the same incident, had induced in her the reasonable belief that her plea and punishment for assault ended her criminal liability.

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No. 90-1185

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF CONNECTICUT,

Petitioner

v.

SUSAN NELSON,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

Opinions Below

The opinion of the Connecticut Appellate Court is reported at 23 Conn. App. 215, 579 A.2d 1104 (1990), and is reprinted in the appendix attached to the State Of Connecticut's Petition for Certiorari at A1 to A8. The order of the Connecticut Supreme Court denying the State's Petition for Certification to appeal from the Appellate Court is reported at 216 Conn. 826, 582 A.2d 205 (1990), and is

reprinted in the petitioner's Appendix at A9.

Jurisdiction

This Court has jurisdiction to review the decision of the Connecticut Appellate Court pursuant to 28 U.S.C. § 1257. The Appellate Court's decision was issued on September 11, 1990, and was made final at the state level on October 23, 1990, when the Connecticut Supreme Court denied the State's Petition for Certification to appeal.

Constitutional and Statutory Provisions Involved

The Constitutional, Statutory and Practice Book Provisions relied upon herein are attached hereto as Appendix I. References to the Appendix attached to the State of Connecticut's Petition for Writ of Certiorari are cited herein as "Petition at A1 [through A9]."

Statement Of The Case

On February 20, 1988 the respondent's vehicle struck and seriously injured 13-year-old Eric Zimmerman in Milford, Connecticut. On that date the respondent was arrested and charged with, inter alia, assault in the second degree with a motor vehicle while intoxicated, in violation of Conn. Gen. Stat. § 53a-60d.

On April 26, 1988 a plea negotiation conference was held in the chambers of the Honorable Charles Gill, who presided in the Superior Court at Derby, Connecticut. Present along with Judge Gill were the prosecutor, Paul Gaetano, defense counsel, Norman Chase, and Attorney Bernard F. Joy, who represented the victim and his family.[1] At that conference, in response to an inquiry by Judge Gill about the victim's condition, Attorney Joy stated that the victim was still hospitalized, in grave condition, and that he might not live.[2] At the conclusion of the conference,

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[1] The petitioner, in its Statement of the Case, fails to make any mention of the fact that plea negotiations in Judge Gill's chambers took place on April 26, 1988. Further, the petitioner ignores the Connecticut Appellate Court's findings concerning the substance of those negotiations. State v. Nelson, 23 Conn. App. at 216 [Petition at A2]. Especially telling is the petitioner's unwillingness to acknowledge that the victim was represented by counsel during those plea negotiations.

[2] Attorney Joy described the plea conference in a sworn affidavit that is part of the trial court record reviewed by the Connecticut Appellate Court. Nelson, 23 Conn. App. at 216 [Petition at A2]. That affidavit provided in pertinent part:

> 3. At that time, a conference was held in the chambers of the presiding Judge for this case, the Honorable Charles Gill. Also present, were Deputy Assistant State's Attorney, Paul Gaetano, and Attorney Norman K. Chase, representing the defendant, Susan Nelson.

(continued...)

the trial judge indicated that he would accept the plea agreement reached by the parties.[3]

Following the in-chambers negotiations, the respondent pleaded guilty to the assault charge pursuant to the agreement, averring that she did so knowingly, intelligently and voluntarily, in exchange for the agreed-upon disposition reached by all parties to the plea negotiations.[4] Prosecutor Gaetano stated on

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[2](...continued)

4. At that time, inquiry was made as to an agreed recommendation for disposition of the case, which was discussed at great length.

5. During this discussion, Judge Gill inquired of me as to the condition of the victim at that time. I informed Judge Gill that Eric Zimmerman was not doing well, and may not make it.

6. Judge Gill then indicated his concurrence of the plea negotiation.

[3] Under the Connecticut Rules of Court parties to a proposed plea agreement may advise the trial court judge in open court or chambers regarding the agreement and the judge "may indicate whether he will concur in or reject the proposed disposition." Practice Book § 706.

[4] The petitioner makes much of the fact that during the canvass, the respondent stated that, apart from the recommended sentence, no other promises were made to induce her guilty plea. As the respondent maintained in the Connecticut Appellate Court, the respondent's

(continued...)

the record just before entry of respondent's plea that "[t]he state ... is going to recommend for Your Honor's consideration, after discussing the matter with counsel for Eric Zimmerman's family, the counsel being Judge Joy,[5] sentence of five years, execution suspended as Your Honor deems appropriate, and with whatever conditions of probation as Your Honor deems appropriate."

At the respondent's sentencing hearing on June 10, 1988, the victim's mother told the court that her son had undergone a second life-saving operation just ten days after the April 26, 1988 court date at which the respondent had entered her plea under the plea agreement. The victim's mother stated that her son's condition was still extremely serious, and that he faced a long and difficult

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[4](...continued)
statement was a fiction common in Connecticut practice and one in which the trial prosecutor himself indulged. For example, as part of the assault plea agreement, the trial prosecutor promised, but did not state on the record, that the state would enter a nolle prosequi on each of the other charges pending against the respondent. Nelson, 23 Conn. App. at 219-20 [Petition at A3, A6]. Indeed, after sentencing, the prosecutor honored that promise, entered the nolles, and, consistent with an intention not to prosecute further, the prosecutor asked that evidence seized in the case be ordered destroyed. Id., 219-20. See Conn. Gen. Stat. § 54-36g(b).

[5] Attorney Joy, also a probate judge in Milford, Connecticut, is sometimes called Judge Joy.

recovery period.[6]

In his brief sentencing remarks, defense counsel told Judge Gill:

> The entire situation is a tragic situation. We have mothers on both sides. My client is the mother of three children. Eric Zimmerman's family obviously has great concern over what goes on here today as demonstrated by their presence here.
>
> Any incarceration granted today or imposed today will only be part of the ordeal that my client will have to go through along with probation. She will never be free of this tragedy. She has three children who are going to suffer in the meantime. She understands as a mother what has taken place here and what has taken place as a result of her actions. She certainly regrets and has tremendous remorse for all this. With all that in mind, we would ask that your Honor accept the agreed recommendation and the probation as outlined.

Prior to imposing sentence, Judge Gill observed:

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[6] The victim's mother also spoke of the victim's potential recovery, though the Connecticut Appellate Court found that "the state and the defendant had to be aware that this [recovery] was by no means a certainty." Nelson, 23 Conn. App. at 219 [Petition at A6].

> These are one of those awful days for everybody in the Court system and outside the Court system. From where I sit, I look down at two sides of the aisles where people are emotionally distraught over an unnecessary event that has life-long ramifications for so many people.... I suppose that the sentence that has been agreed upon is one that saves many people further heartache because of [if] the sentence was not agreed upon, then we go to other machination, that probably in the long run makes things worse for everybody.

Honoring the plea agreement, Judge Gill then sentenced the respondent to a term of five years incarceration, execution suspended after three years, with five years probation, with three special conditions: (1) in-patient or outpatient alcohol treatment if deemed appropriate by her probation officer; (2) no use of alcohol during the five year probation; and (3) one thousand (1,000) hours of community service in either a hospital setting or an alcohol education program. See, Nelson, 23 Conn. App. at 217 [Petition at A3].

Addressing the respondent, the victim's relatives, and the attorneys for the defendant, the State and the victim, Judge Gill's concluding words were: "There is no magic wands the Courts have to make everything right. We cannot reverse history. We can only look forward. And I urge both sides to look forward here as best you can.... My sympathy to all. My best wishes to all." The prosecutor then requested that contraband seized from the respondent at the scene of the crime be destroyed. The trial court granted the request, and ordered the evidence

destroyed. The respondent immediately began serving her sentence at the Connecticut Correctional Institute at Niantic, Connecticut.

Some four and a half months after the defendant's sentencing, on October 26, 1988, the victim died from his injuries, never having left the hospital. Nelson, 23 Conn. App. at 217 [Petition at A3]. On February 21, 1989 the State of Connecticut initiated a new prosecution of the respondent, charging her with manslaughter in the second degree with a motor vehicle while intoxicated. Conn. Gen. Stat. § 53a-56b (Rev. to 1985). This charge relied on the same incident and the same conduct as respondent's earlier prosecution and conviction for assault in the second degree with a motor vehicle while intoxicated.

The respondent moved to dismiss the manslaughter prosecution (hereafter "Nelson II") on two separate and distinct grounds.[7] First, she claimed double jeopardy. Second, she claimed that her plea agreement with the state barred the new homicide prosecution, because she reasonably understood the terms of the agreement to be that she would face no further criminal liability in exchange for that plea. In support of the latter argument, the respondent relied upon, inter alia, Attorney Joy's representation made during the plea negotiation conference that the victim "may not make it" and on the State's conduct, in the face of the victim's precarious condition, throughout plea negotiations.

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[7] Respondent was found indigent in Nelson II. Thus, Attorney Chase represented her as a Special Public Defender in the trial court and the University of Connecticut Legal Clinic has represented her on appeal.

The Honorable Robert E. Reilly, Judge, held a hearing on the respondent's motion to dismiss. At the hearing the respondent's attorney, Norman Chase, who had negotiated the earlier assault plea agreement, declared:

> Our concern is that we are being charged with a subsequent offense for something that we had a reasonable belief and understanding that -- it was in contemplation at the time we entered our previous plea .... For all intents and purposes, it was our reasonable belief that that plea was a -- represented a final resolution of the matter; and a new prosecution would violate that plea agreement.

At the hearing, Judge Reilly found, inter alia, that Attorney Joy during the assault plea negotiation session "had informed all concerned of the victim's precarious condition." Nelson, 23 Conn. App. at 217 [Petition at A3]. However, Judge Reilly denied the respondent's motion to dismiss, concluding that the law "would not hold the state to predicting the victim's death[.]" Id.[8] The respondent thereupon appealed to the Connecticut Appellate Court.[9]

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[8] The trial court also rejected the respondent's claim that double jeopardy barred her prosecution for manslaughter.

[9] By agreement, the trial court allowed the respondent to withdraw her assault guilty plea, and the respondent thereupon pleaded nolo contendere to manslaughter in the second degree, conditional on her right to appeal from the denial of her motion to dismiss.

(continued...)

In the Connecticut Appellate Court, the respondent pressed her claim that the manslaughter prosecution in Nelson II violated due process of law because, in bargaining for her plea to assault, the State induced in her a reasonable belief that she faced no further criminal liability in the matter [Petition at A4]. The respondent argued that the benefits exchanged between the government and a criminal defendant in a plea bargain have value to each only if the plea agreement is final and enforceable for the government and the defendant alike. The respondent relied on Connecticut and federal decisional law and, in particular, on the New Jersey Supreme Court's decision in a nearly identical case, State v. Thomas,[10] 294 A.2d 57 (N.J. 1972).

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[9](...continued)
Nelson, 23 Conn.App. at 217. Conn. Gen. Stat. § 54-94a. The court then sentenced the respondent to ten years imprisonment, execution suspended after four years, with five years probation, with credit for time served on the earlier conviction.

[10] In Thomas, the defendant was charged with assault. During the course of plea negotiations, his counsel became aware that the victim might die from injuries sustained in the assault. The defendant pled guilty to assault, in exchange for the state's promise to dismiss all other pending charges. Subsequently, the victim died as a result of injuries sustained in the assault, and the state attempted to bring a murder indictment. The New Jersey Supreme Court held that, because the defendant reasonably understood his plea of guilty to assault as a final adjudication of all criminal liability flowing from the
(continued...)

The Connecticut Appellate Court reviewed the record and resolved the dispute over the terms of the original plea agreement in favor of the respondent's understanding of its finality. Nelson, 23 Conn. App. at 219-21 [Petition at A4-A7]. The Court's analysis focused upon "the real intent on the parties, and most significantly, of [the defendant] ...." Nelson, 23 Conn. App. at 219, quoting Paradiso v. United States, 689 F.2d 28, 31 (2d Cir. 1982), cert. denied, 459 U.S. 1116 (1983). Relying upon this Court's decision in Santobello v. New York, 404 U.S. 257 (1971), the Appellate Court concluded that the respondent reasonably believed that the assault plea agreement terminated all her criminal liability flowing from the accident. Nelson, 23 Conn. App. at 219 [Petition at A5-A6].

The Appellate Court deemed specific performance of the assault plea agreement the "only appropriate remedy because it is the only way that the status quo can be restored." Nelson, 23 Conn. App. at 220-21 [Petition at A7]. The Appellate Court reversed the manslaughter conviction, and remanded the case with instructions that the respondent's assault conviction be reinstated.[11]

The State of Connecticut sought review of the Appellate Court's decision in the Connecticut Supreme Court. The gravamen of the

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[10](...continued)
original incident, the murder indictment violated the terms of the plea bargain. Id., 61-62.

[11] The Connecticut Appellate Court did not reach the respondent's double jeopardy claim.

State's Petition For Certification was that the Connecticut Appellate Court had engaged in "appellate factfinding to contradict the findings of the trial court."[12] In cursory fashion the State also challenged the Appellate Court's legal determination that due process of law requires enforcement of a defendant's reasonable understanding of a plea agreement's terms.

On October 23, 1990 the Connecticut Supreme Court denied the State of Connecticut's petition for certification to appeal the decision of the Appellate Court. State v. Nelson, 216 Conn. 826, 582 A.2d 205 (1990).

Reasons For Denying
The Petition For Certiorari

The State of Connecticut does not seriously dispute the correctness of the Connecticut Appellate Court's conclusions based on the "specific facts of this case." Petition at 8. Instead, the State fears that an important "question of law and policy" is posed by this case even though the Court's analysis of the ambit of the plea agreement is fair and accurate on this record. The respondent submits that due process analysis is necessarily fact-based and case-specific. Thus this case does not, sub rosa, pour the due process guarantee into a stiff cast. The outcome in this case, simply, is fair.

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[12] The State devoted eight of the petition's ten pages to the claim that the Connecticut Appellate Court impermissibly engaged in factfinding.

The State seeks review of the Connecticut Appellate Court decision ordering the specific enforcement of a bargained for term of a plea agreement, i.e., finality of criminal liability for an incident. The State challenges the Connecticut Appellate Court's conclusion that due process of law requires enforcement of the plea agreement in Nelson I, thereby barring the renewal of criminal liability for the same event. The State predicts that if this Court leaves undisturbed the decision in Ms. Nelson's case, "an inescapable diminution in the solemnity of guilty pleas in American courts" will follow. Petition at 7. The respondent disagrees. The vitality of plea bargaining in American Criminal Justice is not at stake in this case. There is nothing novel about the application of contract principles to determine the content of a given plea agreement. See, e.g., Commonwealth v. Smith, 427 N.E.2d 739 (Mass. 1981); Sanford v. Phoenix Municipal Court, 717 P.2d 900 (Ariz. 1986); Ricketts v. Adamson, 483 U.S. 1 (1987); State v. Thomas, 294 A.2d 57 (N.J. 1972).

The State characterizes the ruling below as conflicting with this Court's decisions in United States v. Benchimol, 471 U.S. 453 (1986), and Blackledge v. Allison, 431 U.S. 63 (1977). The respondent disagrees. The ruling below does not conflict with this Court's decisions emphasizing the essential need for fairness and finality in the plea bargaining process. The petitioner's claim that the Connecticut Appellate Court decision "disrupts the delicate balance between a defendant's rights and a state's interests in plea bargaining" is incorrect: the decision below maintains that balance because it "presuppose[s] fairness" in the plea bargaining process. Santobello, 404 U.S. at 261.

Argument

In Santobello v. New York, 404 U.S. 257 (1971), this Court declared that principles of fairness embodied in the Due Process Clause of the Fourteenth Amendment govern the practice of plea bargaining. Because a criminal defendant waives an array of constitutional rights in entering a voluntary guilty plea, due process of law mandates "fairness in securing agreements between an accused and a prosecutor." Santobello, supra, 257. The plea bargaining process "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." Santobello,[13] supra, 262. This Court declared:

> [W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello, supra, 262.

The decision of the Connecticut Appellate Court is consistent with Santobello. In both cases, the government persuaded a defendant to

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[13] In Santobello, the defendant pleaded guilty to an offense in exchange for the prosecutor's promise to make no sentencing recommendation. Santobello, supra, 258. At sentencing a new prosecutor made a sentencing recommendation, in violation of the earlier plea agreement. Id., 259. This Court held the prosecutor's breach of the plea agreement violated due process of law, and remanded to state court for determination of the proper remedy, i.e., specific performance or vacation of the plea.

enter a plea of guilty in exchange for an inducement, and later attempted to dishonor that inducement. In each, the government's breach of promise denied the defendant due process of law. Accord, State v. Thomas, 294 A.2d 57 (N.J. 1972); Commonwealth v. Alvarado, 276 A.2d 526, 529 (Pa. 1971); Commonwealth v. Smith, 427 N.E.2d 739, 742 (Mass. 1981); Sanford v. Phoenix Municipal Court, 717 P.2d 900, 901 (Ariz. 1986).

This Court has "necessarily adopted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). The State of Connecticut succeeded in persuading the respondent to plead guilty to a felony and, voluntarily, to go to jail in exchange for the benefit of knowing that the criminal justice part of a tragic car accident was at an end. Fundamental fairness requires that the State honor the finality of the plea bargain and the respondent's reasonable expectation that the State's interest in prosecuting her was exhausted by her plea and resulting incarceration. The record shows that the State's conduct through the plea bargaining process on April 26, 1988 "strongly suggests that it shared the defendant's interpretation of the plea agreement." Nelson, 23 Conn. App. at 219 [Petition at A6].

The petitioner asserts that the decision below conflicts with this Court's decision in United States v. Benchimol, 471 U.S. 453 (1985). Petition at 10-11. The petitioner reads much into Benchimol, a per curiam decision involving a collateral attack on a five year old guilty plea. The plea in Benchimol, unlike the instant case, was governed by Federal Rule of Criminal Procedure 11(e),

which "provides an elaborate formula for the negotiation of plea bargains" in federal cases. Id., 455. Benchimol's complaint was that a United State's Attorney, upon making a sentence recommendation pursuant to a plea agreement, failed to make the recommendation "enthusiastically". Id., 455.

This Court declared in Benchimol that "it was error for the Court of Appeals to imply as a matter of law a term which the parties themselves did not agree upon." Benchimol, 471 U.S. at 456 (emphasis added). In contrast, the court in Nelson found an actual agreement between the prosecutor and the respondent that no further prosecution would follow the assault guilty plea. Where the Benchimol Court projected a term into an agreement as a matter of law, it is clear that the Nelson Court did no such thing. Indeed, the gravamen of the State's complaint in the Connecticut Supreme Court was that, as a matter of fact, the Appellate Court was in error in concluding that the trial prosecutor by his words and actions showed the State "shared the defendant's interpretation of the plea agreement." Nelson, supra, 219 [Petition at A5, A6].

The petitioner's reliance upon Blackledge v. Allison, 431 U.S. 63 (1977), is also misplaced. In Blackledge, respondent Allison pleaded guilty in a North Carolina court to attempted safe robbery. At the entry of plea, the trial judge asked Allison: "Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promises or threat to you to influence you to plead guilty in this case?" Id., 66. Allison responded: "No." Id. The trial judge then sentenced Allison to seventeen to twenty-one years in prison. Id., 63.

Allison later filed a federal habeas corpus

petition, claiming that his guilty plea had to be set aside because his plea was the product of an unkept agreement that his sentence not exceed ten years. The federal district court dismissed the petition, deeming Allison's statement at the entry of plea that no promises induced his plea as conclusive evidence that no due process violation occurred. Id., 70.

This Court concluded that the lower court should not have summarily dismissed the petition because Allison's statement when canvassed that no promises had induced his guilty plea was not altogether conclusive, of his claim: "[T]he barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable." Id., 74.

To the degree it is material here at all, Blackledge supports the decision reached in Nelson. This Court recognizes the need under certain circumstances to look behind the in-court statements of a defendant to ascertain the constitutional validity of his or her guilty plea.[14] The Connecticut Appellate Court did no more than this in concluding that, notwithstanding the respondent's statement at the time of plea, the State's prosecution of her for manslaughter violated an agreed upon term of that plea agreement.

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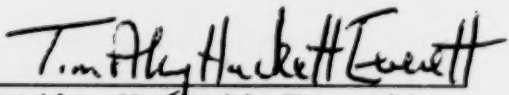
[14] Accord, Quintana v. Robinson, 31 Conn. Supp. 22, 26, 319 A.2d 515 (1973) ("Santobello teaches us that a defendant's 'no promises' declaration when he pleads guilty pursuant to 'plea bargaining' is not inviolable"); State v. Torres, 182 Conn. 176 (1980) ("'answers elicited from the defendant in open court should be something more than a mouthing of platitudes'", id., 180; plea canvas does not always circumscribe record, id., 191.)

Conclusion

For all the foregoing reasons, the respondent respectfully asks this Court to deny the State of Connecticut's Petition For A Writ Of Certiorari.

Respectfully submitted,

SUSAN NELSON, THE RESPONDENT

BY: 

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No. 90-1185

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
Petitioner

v.

SUSAN NELSON,
Respondent

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

Constitution of the United States,

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Connecticut, Article First:

Sec. 8. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.

Sec. 9. No person shall be arrested, detained or punished, except in cases clearly warranted by law.

Connecticut General Statutes, § 53a-56b defines Manslaughter in the second degree with a motor vehicle:

(a) A person is guilty of manslaughter in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as a consequence of the effect of such liquor or drug.

(b) Manslaughter in the second degree with a motor vehicle is a class C felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year.

Connecticut General Statutes, § 53a-60d defines Assault in the second degree with a motor vehicle:

(a) A person is guilty of assault in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes serious physical injury to another person as a consequence of the effect of such liquor or drug.

(b) Assault in the second degree with a motor vehicle is a class D felony and the court shall suspend the motor vehicle operator's license or nonresident

operating privilege of any person found guilty under this section for one year.

Connecticut General Statutes, § 54-36g concerning destruction of evidence upon final disposition of a criminal action provides in part:

* * * *

(b) Upon final disposition of the criminal action or, if there is no criminal action, at any time upon motion of the prosecuting official, the court shall order the destruction of any controlled drug, controlled substance or drug paraphernalia not previously destroyed pursuant to an order under subsection (a) of this section, or order it delivered to the commissioner of consumer protection as soon as possible.

Connecticut Rules of Court

Practice Book, § 687:

Procedure for Plea Discussions -- In General: The prosecuting authority and counsel for the defendant, or the defendant when he is not represented by counsel, may engage in discussions at any time with a view towards disposition. Negotiations may occur either prior to or after the arraignment. The prosecuting authority shall be in his office at reasonable times for the purpose of giving to counsel for the defendant, and to all others in interest, a reasonable opportunity for consultation with him.

Practice Book, § 690:

> **Procedure for Plea Discussions -- Subject Matter:** Discussion need not be limited to the entry of a plea of guilty or nolo contendere, and may include any disposition without trial permitted under these rules or the General Statutes. The parties may also discuss pretrial motions filed or yet to be filed which would lead to a disposition of the case without trial.

Practice Book, § 694:

> **Procedure for Plea Discussions -- Notice of Plea Agreement:** If a plea agreement has been reached by the parties, which contemplates the entry of a plea of guilty or nolo contendere, the judicial authority shall require the disclosure of the agreement in open court or, on a showing of good cause, in camera at the time the plea is offered. Thereupon the judicial authority may accept or reject the agreement, or he may defer his decision on acceptance or rejection until there has been an opportunity to consider the presentence report, or he may defer it for other reasons.

Practice Book, § 706:

> **Disposition Conference -- Nature of Conference -- Notice of Agreement:** If the parties reach an agreement which contemplates the entry of a plea of guilty or nolo contendere, they may advise the judicial authority in advance of the plea. The judicial authority may indicate whether he will concur in or reject the proposed disposition.